FILED
NOV 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-383

In the Supreme Court of the United States

JAMES GILBERT BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

CHRISTOPHER R. MADSEN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), applies retroactively to all cases decided in the October 2004 Term, including cases that became final before *Booker* was decided.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 2
Barefoot v. *Estelle*, 463 U.S. 880 (1983) 4
Blakely v. *Washington*, 542 U.S. 296 (2004) 2
Bousley v. *United States*, 523 U.S. 614 (1998) 10
Clay v. *United States*, 537 U.S. 522 (2003) 7, 8
County of Riverside v. *McLaughlin*, 500 U.S. 44 (1991) 5
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 4, 5, 6, 7, 8
Mackey v. *United States*, 401 U.S. 667 (1971) 5, 6
Massaro v. *United States*, 538 U.S. 500 (2003) 10
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) 4
Powell v. *Nevada*, 511 U.S. 79 (1994) 5
Slack v. *McDaniel*, 529 U.S. 473 (2000) 4
Teague v. *Lane*, 489 U.S. 288 (1989) 5, 6, 7, 8
United States v. *Booker*, 543 U.S. 220 (2005) 2, 3, 4, 8

Constitution, statutes and rule:

U.S. Const. Amend. VI 2, 9
21 U.S.C. 841(a)(1) 2

Statutes and rule—Continued: Page

21 U.S.C. 846 2
28 U.S.C. 2 3
28 U.S.C. 2253(c)(1) 3
28 U.S.C. 2253(c)(2) 4
28 U.S.C. 2255 ..... 2, 3, 4, 10
Sup. Ct. R. 3 3

In the Supreme Court of the United States

No. 06-383

JAMES GILBERT BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter, but is reprinted in 186 Fed. Appx. 406. The opinion of the district court (Pet. App 11a-13a) is reported at 390 F. Supp. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2006. The petition for a writ of certiorari was filed on September 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of conspiracy to possess 500 grams or

more of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 11a-12a. Petitioner was sentenced to 360 months of imprisonment. *Id.* at 12a. The court of appeals affirmed, and this Court denied a petition for a writ of certiorari. 87 Fed. Appx. 312 (per curiam), cert. denied, 543 U.S. 818 (2004); Pet. App. 12a.

Less than one year later, petitioner brought a motion to set aside his sentence under 28 U.S.C. 2255 based on *United States* v. *Booker*, 543 U.S. 220 (2005). The district court denied the motion. Pet. App. 14a. The court of appeals denied petitioner's request for a certificate of appealability and dismissed the appeal. *Id.* at 4a.

1. On June 13, 2002, petitioner and twelve other individuals were indicted for conspiracy to possess 500 grams or more of a mixture of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Indictment 1-2. Following a jury trial in January 2003, petitioner was convicted. The jury found beyond a reasonable doubt that the object of the conspiracy was to possess, with intent to distribute, 500 grams or more of a mixture of methamphetamine. See Pet. App. 11a-12a. On April 11, 2003, the district court sentenced petitioner to 360 months of imprisonment, based in part on additional drug quantities not found by the jury. See *id.* at 12a; PSR ¶ 23. Petitioner appealed, and the court of appeals affirmed his conviction and sentence. See 87 Fed. Appx. at 312-314.

On June 14, 2004, petitioner filed a petition for a writ of certiorari. His sole claim was that the government had violated his rights under the Speedy Trial Act. See 03-1659 Pet. 6-13. Petitioner raised no Sixth Amendment challenge to his sentence under either *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or *Blakely* v. *Washing-*

ton, 542 U.S. 296 (2004). This Court denied the petition on Monday, October 4, 2004, the first day of the October 2004 Term.[1] 543 U.S. 818. Later that day, the Court heard argument in *Booker*, *supra*.

2. On January 12, 2005, this Court decided *Booker*. Based on that decision, petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. The district court denied the motion, noting that petitioner's conviction "became final prior to the decision in *Booker*" and holding that "*Booker* does not apply retroactively to his §2255 motion for collateral review." Pet. App. 12a.

Petitioner promptly filed a motion to reconsider, arguing that *Booker* applied to his case because "his writ of certiorari was pending during the same term that the rule in *Booker* was announced." Pet. App. 9a. The district court denied the motion, reiterating that petitioner's case was no longer pending at the time *Booker* was decided, and holding that "the fact that the ruling in *Booker* came down within a year of the final order in this case" does not mean that petitioner is entitled to resentencing. *Id.* at 9a-10a.

Both the district court (Pet. App. 7a-8a) and the court of appeals (*id.* at 1a-3a) denied petitioner's request for a certificate of appealability (COA) under 28 U.S.C. 2253(c)(1).

---

[1] Petitioner incorrectly states (Pet. 6) that the October 2004 Term began on October 1, 2004. In fact, "[t]he Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year." Sup. Ct. R. 3. See 28 U.S.C. 2.

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred in denying his request for a COA because *Booker* applies retroactively to his case. He concedes that this Court denied his petition for a writ of certiorari more than three months before *Booker* was decided. Pet. 4. Nonetheless, he argues that he should benefit from retroactive application of *Booker* on the novel theory that "a case pending during a term of court must be found to benefit from the retroactive application of the favorable holding in another case decided during that same term." Pet. 5. Petitioner's position contravenes well-established precedent and has no support in law. Further review is unwarranted.

1. Under 28 U.S.C. 2253(c)(2), a COA may issue "only where a petitioner has made 'a substantial showing of the denial of a constitutional right.'" *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003) (quoting 28 U.S.C. 2253(c)(2)). To make such a showing, a petitioner must demonstrate that "jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983)). The court of appeals correctly concluded that petitioner failed to make the required showing because *Booker*, the sole basis for the Section 2255 motion, does not apply to his case.

a. As the Court's decision indicates, *Booker* v. *United States* applies "to all cases on direct review" at the time of the decision. 543 U.S. 220, 268 (2005) (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). In *Grif-*

fith, the Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U.S. at 328. For purposes of retroactivity analysis, a case is considered "pending on direct review" or "not yet final" if it remains pending or not yet final at the time the Court announces the new rule. See *id.* at 322-323 (explaining that "after we have *decided* a new rule in the case selected," the Court must "apply that rule to all similar cases pending on direct review") (emphasis added); *id.* at 329 (Rehnquist, C.J., dissenting) (agreeing with the majority insofar as it accepted Justice Harlan's view in *Mackey* v. *United States*, 401 U.S. 667, 681 (1981) (Harlan, J., concurring and dissenting), that "new constitutional rules governing criminal prosecutions should apply retroactively for cases pending on direct appeal *when the rule is announced*") (emphasis added). For example, in *Powell* v. *Nevada*, 511 U.S. 79, 80 (1994), a state supreme court had concluded that this Court's decision in *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), did not apply retroactively to any prosecution "commenced prior to the rendition of that decision." The Court rejected that argument, holding that the state court had misread *Griffith*: "'[A] . . . rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, . . . not yet final' *when the rule is announced*." *Ibid.* (emphasis added) (quoting *Griffith*, 479 U.S. at 328). See also *Teague* v. *Lane*, 489 U.S. 288, 304 (1989) (plurality opinion) (describing *Griffith* as articulating a new standard "for cases pending on direct review *at the time a new rule is announced*") (emphasis added).

The Court in *Griffith* offered two reasons for its holding. First, once the Court "ha[s] decided a new rule

in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Griffith*, 479 U.S. at 322-323. In the words of Justice Harlan, "the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Id.* at 323 (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring and dissenting)). Second, "selective application of new rules violates the principle of treating similarly situated defendants the same," *ibid.*, and the Court therefore "refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final," *Teague*, 489 U.S. at 304 (plurality opinion).

Both of those reasons reinforce that the crucial inquiry is whether a case has become final at the time the new rule is announced. First, when a case becomes final before the announcement of a new rule, the Court by definition has not "disregard[ed] current law," and instead has performed its constitutional function of adjudication. In articulating his concerns about the integrity of judicial review, Justice Harlan excluded cases that have "run the full course of appellate review" and become final. *Griffith*, 479 U.S. at 323 (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring and dissenting)). Second, when a case becomes final before the announcement of a new rule, no inequity results from failing to automatically apply the rule retroactively because defendants whose judgments have become final are not "similarly situated," *ibid.*, to defendants whose cases remain pending. As this Court noted in *Teague*,

"[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 489 U.S. at 309 (plurality opinion).

In this case, petitioner's original petition for a writ of certiorari on direct appeal was denied on October 4, 2004, more than three months before the announcement of *Booker*. 543 U.S. 818. According to this Court's "unvarying understanding," "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay* v. *United States*, 537 U.S. 522, 527-528 (2003). See *Griffith*, 479 U.S. at 321 n.6 (noting that a conviction becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). By that standard, petitioner's conviction was already final, and his case was no longer pending on direct review, when this Court decided *Booker*. As a result, *Booker* does not apply retroactively to his case.

b. Petitioner argues (Pet. 7) that this Court's retroactivity precedents produce "unconstitutionally arbitrary" results because too much depends on "the happenstance of the placement of the controlling case on the docket." He proposes, instead, that all cases on the Court's docket should benefit from the retroactive application of subsequent decisions during the same Term of Court, regardless of the actual time of disposition.

Petitioner cites no authority in support of his novel theory that final decisions should be treated as if they were "pending" on direct review for the remainder of

the Term, and no Justice of this Court has ever recommended it. On its face, petitioner's proposal would do little to resolve the problem of "arbitrar[iness]" of which he complains. He prefers a cutoff date at the beginning of each Term, but that rule just as "arbitrar[ily]" excludes petitions docketed and denied at the end of the previous Term, based solely on the "happenstance" of the docketing calendar. Petitioner offers no principled reason to reopen all final judgments from the same Term of Court, rather than all judgments that became final in the previous two Terms, or three Terms, or in the last calendar year, or in any number of other possible periods. See Pet. 6 (asserting, without explanation, that "a much greater effect would be accomplished with the clarity of the parameters for retroactive application having the opening day of a term as its starting point").

By contrast, this Court has offered sound reasons for its bright-line rule that constitutional decisions have automatic retroactive application only in cases that have not become final when the decision is announced. That "long-recognized, clear" rule provides guidance to litigants and courts, see *Clay*, 537 U.S. at 527-528, helps to ensure equitable treatment of similarly situated litigants, *Griffith*, 479 U.S. at 323, and affords proper respect to the final judgments of state and federal courts, see *Teague*, 489 U.S. at 309 (plurality opinion). Petitioner's claim that this Court's retroactivity precedents are "arbitrary" is simply incorrect.

To the extent that petitioner has raised an equitable objection to the treatment of his petition, as compared with the petitions in *Booker* and its companion case, *Fanfan* v. *United States*, 543 U.S. 220 (2005), intervention by this Court is unwarranted. Whenever a petition raises issues substantially similar to the questions pre-

sented in another case in which this Court already has granted certiorari, this Court has the option of holding the petition in abeyance pending the outcome of the other case. That action prevents the judgment from becoming final, and ensures that the petitioner will benefit from retroactive application of any new rule that emerges from the other case.

In this case, however, the Court did not hold petitioner's original petition in abeyance pending the outcome of *Booker* because the petition did not raise any Sixth Amendment or sentencing objection. The sole claim in the original petition was that the government had violated petitioner's rights under the Speedy Trial Act. Because that claim in no way depended on the outcome of *Booker*, the Court properly denied the petition, rather than holding the case for *Booker*. And because denial of the petition rendered the case final, *Booker* does not apply retroactively to petitioner's case. The court of appeals properly denied his request for a COA.

2. Petitioner makes no claim that *Booker* applies retroactively to all cases on collateral review. Even if he did, however, further review by this Court would be unwarranted. See U.S. Br. in Opp. at 6-11, *Guzman* v. *United States*, No. 06-5662, 2006 WL 2233210 (Oct. 30, 2006). All 11 courts of appeals that have addressed the issue have correctly concluded that *Booker* is not retroactive because it is a new rule of criminal procedure that is not a "watershed" rule. This Court also has denied review in at least eight cases raising the issue. See *id.* at 6. For the reasons set out in more detail in the brief in opposition in *Guzman*, there is no reason for this Court to review this retroactivity issue.

Moreover, petitioner's failure to raise any Sixth Amendment objection on direct appeal, see Mot. Under

28 U.S.C. 2255, at 3, forecloses the availability of collateral review of that issue now. The "general rule" in federal court is that "claims not raised on direct appeal may not be raised on collateral review." *Massaro* v. *United States*, 538 U.S. 500, 504 (2003). The procedural-default rule helps "to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Ibid.* To obtain review on the merits of this defaulted constitutional claim, petitioner must show either (1) "cause" for his default and actual "prejudice" or (2) that he is "actually innocent." *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (citations omitted). Because petitioner has made no attempt to demonstrate that either exception applies, he has procedurally defaulted that claim, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

CHRISTOPHER R. MADSEN
Attorney

NOVEMBER 2006